IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

R.S.A. No. 20 of 1995.

Judgement reserved on:

Date of decision : April 4, 2006.

Ajudhia Lal …….. Appellant.

Versus

Smt. Sandhya Devi & ors. ……. Respondents.

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting? Yes

For the appellant: Mr. J.R.Poswal, Advocate.

For the respondents: Mr. Bhupender Gupta, Sr. Advocate with Mr Janesh Gupta, Advocate.

Surjit Singh J. (Oral).

This appeal by the plaintiff is directed against the judgement and decree dated 5.12.1994 of the learned District Judge, Bilaspur, whereby reversing the decree of declaration with further relief of permanent prohibitory injunction, passed by the trial court in favour of the appellant, the suit of the appellant- plaintiff has been dismissed.

Facts relevant for the disposal of the appeal may be noticed. Appellant, hereinafter called plaintiff, filed a suit seeking declaration that he and proforma respondents were owners in

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Whether reporters of local Papers may be allowed to see the judgment?Yes

possession of land measuring 15 Biswas, bearing khasra No. 237 on the basis of an agreement of exchange having taken place between him and respondent- defendant Babu Ram (deceased). By way of further relief, permanent prohibitory injunction had been sought restraining the respondent- defendants Babu Ram, Niku and Jagdish from causing any interference in his possession or raising any construction on any portion of the said land. It was alleged that initially one Khalelo and Kirpi used to be the owners of Khasra No. 237 and that Kirpi transferred her share in favour of Khalelo and Khalelo became the owner of khasra No. 237. After sometime, Khalelo transferred khasra No. 237 in favour of defendant Babu Ram. When on such transfer, Babu Ram obtained demarcation, it was found that in fact khasra No. 237 was in possession of the plaintiff and proforma defendants, while khasra No. 236, belonging to the plaintiff and proforma defendants had been in possession of Khalelo and on transfer, Babu Ram got possession of said khasra No. 236. When this factual position came to light, an agreement of exchange took place, which was reduced into writing. The said writing is Ex. PW 3/A. However, entries in respect of khasra No. 237 were not got changed in favour of the plaintiff by Babu Ram defendant, inspite of the execution of the aforesaid writing. Plaintiff being an illiterate person remained under the impression that after the execution of the writing, the revenue entries might have been corrected. In the year 1980, defendant Babu Ram, allegedly tried to interfere in the possession of the plaintiff over Khasra No. 237 and threatened to construct a house on a portion thereof. It was then that the plaintiff procured the copy of Missal Hakiat and came to know that entries in the revenue papers have

not been changed in respect of said land in his favour. So he filed the suit for declaration and permanent prohibitory injunction.

Respondents- defendants contested the suit. It was alleged that khasra No. 237 was owned by the defendant Babu Ram, as it had been transferred to him by Khalelo and as regards khasra No. 236, it was alleged that it had been in possession of Babu Ram since long and he had acquired title to it by adverse possession. In the alternative, it was stated that in case the plea of adverse possession failed, Babu Ram had acquired title to land bearing khasra No. 236 measuring 10 Biswas, because earlier he was in occupation of the said khasra number as a tenant at will. Some preliminary objections were also raised, which need not be noticed, because they are not relevant for determining the substantial questions of law, on which the appeal has been admitted.

Learned trial court tried the matter and came to the conclusion that though khasra No. 237 had been transferred in favour of Babu Ram defendant by Khalelo, as a matter of fact, Khalelo was not in possession of that khasra number and instead she was in possession of khasra No. 236, belonging to the plaintiff and proforma defendants and so defendant Babu Ram got the possession of khasra No. 236 from Khalelo in place of khasra No. 237. The trial court further concluded that possession of khasra No. 237 had been with the plaintiff and proforma defendants and when on demarcation it was found by both the parties, i.e. plaintiff and proforma defendants on one side and contesting defendant Babu Ram on the other that they were in possession of each other's properties, they made an agreement of exchange, which was reduced into writing in the form of Ex. PW 3/A. But the entries

in the revenue papers were not got changed on the basis of that writing. On the basis of the aforesaid finding, the learned trial court decreed the plaintiff's suit declaring that he and proforma defendants were in possession of khasra No. 237 and that its ownership stood transferred to them by way of agreement of exchange Ex. PW 3/A, in lieu of their own khasra No. 236.

Defendants went in appeal to the District Judge. The District Judge has reversed the judgement and decree of the trial court holding that (i) though in the plaint it is alleged that Khalelo had made a sale in favour of Babu Ram, the entries in the revenue papers indicate that she made a gift, (ii) besides the defendants, there were several co-owners of khasra No. 237 and thus other co-owners being not party to the agreement Ex. PW 3/A, the same was not valid and a legal document; (iii) the property involved being worth more than rupees one hundred, compulsory registration of the document was required; (iv) plaintiff and proforma defendants also being not the exclusive owners of khasra No. 236, because some other persons were also joint owners with them, they could also not have agreed for the exchange of the title of said khasra number without having been authorized by other co-owners to do so, and (v) the trial court was not right in placing reliance upon the report and Tatima prepared by the Patwari during the course of spot inspection conducted by the Presiding Officer of the trial court in connection with the disposal of application for grant of temporary injunction.

The appeal was admitted on the following two substantial questions of law:-

1. Whether the impugned decree and the judgement is vitiated because of the non-consideration and not properly appreciation of the evidence on record including copy of the Jamabandi Ex. P-1, copy of the inspection note PY and PZ and copy of the Tatima PW 2/A and also exchange note PW 3/A?

2. Whether exchange PW 2/A requires any registration although value of the property is not more than Rs. 100/-?

Learned counsel for the respondents stated at the very out set that findings of fact recorded by the first appellate court call for no interference as the same are based on sound reasoning and proper appreciation of evidence, and hence, the first question, on which the appeal has been admitted does not arise for consideration. I do not find myself in agreement with the contention of the learned counsel. Parties took definite and specific stands in their pleadings. Appellant- plaintiff categorically stated that he alongwith the proforma respondents had been found in possession of khasra No. 237, which belonged to the respondents- defendants and the latter were found in possession of khasra No. 236, which belonged to the former. Defendants in their written statement claimed that they were exclusive owners in possession of khasra No. 237 on the basis of title. As regards khasra No. 236, they again claimed exclusive ownership and possession based on adverse possession. It is in the light of these specific stands of the parties that the evidence of the parties was required to be appreciated, but the first appellate court has not done so. It

appears to have lost sight of these specific stands of the parties while appreciating evidence.

Learned first appellate court has held that the writing Ex. PW 3/A being not registered, cannot be used as piece of evidence in support of the contention that there had been an exchange between the plaintiff and the defendants with respect to khasra Nos. 237 and 236. I have been taken through the writing Ex. PW 3/A. The document has been executed only by defendant Babu Ram. It is not executed by the plaintiff or the proforma defendants. Therefore, the writing cannot be used as a deed of exchange. But that does not mean that the document is not a relevant piece of evidence. This writing, which is duly proved by its scribe PW 3 Sh. Bhagat Ram is an admission by Babu Ram that though he was the owner of khasra No. 237, its possession was with the plaintiff-appellant and that he and other defendants were in possession of khasra No. 236 belonging to the plaintiff. I do not have any manner of doubt that this is a very strong piece of evidence against the defendants, being admission by one of the defendants.

Learned counsel for the appellant has argued that the first appellate court was not justified in rejecting the Tatima prepared by the Patwari on the spot when the Presiding Officer of the trial court went to the spot and that the said Tatima proves that a portion of khasra No. 237, shown by min khasra No. 237/1, had been encroached upon after the institution of the suit. Spot inspections are carried out by the court with a view to appreciating the evidence. In the present case, the Presiding Officer of the trial court went to the spot to appreciate the contentions (not the evidence) of the parties with regard to the application for temporary

injunction, much before the commencement of the trial, and, therefore, the spot inspection note and the Tatima were got prepared from the Patwari on the spot cannot be looked into for the purpose of appreciation of the evidence. In any case, there is nothing on the record that the Patwari, namely PW 2 Sh. Jagan Nath, carried out the demarcation on the spot, as per instructions. In any case, Patwari was not competent to give demarcation. Therefore, the Tatima prepared by the Patwari cannot be used as a piece of evidence for granting the relief of mandatory injunction asked for by the appellant- plaintiff in the amended plaint.

Learned counsel representing the respondents argued that the entries in the revenue papers falsify the claim of the appellant that they were in exclusive possession of khasra No. 237, inasmuch as, in the jamabandies proved on the record, i.e. Ex. P-1 pertaining to the year 1963-64 and Ex. DA, pertaining to the year 1979-80, defendants are recorded in exclusive possession of khasra No. 237. It is true that presumption of truth attaches to the entries in the jamabandies. However, the presumption, even though very strong, is rebuttable. In the present case, this presumption stands rebutted by the admission of Babu Ram, in the form of writing Ex. PW 3/A. Needless to say that Babu Ram by whom this writing is executed, chose not to step into the witness box, despite the fact that plaintiff Ajudhia Lal and the scribe of the writing categorically stated that the contents of the writing were read out and explained to Babu Ram, who after admitting the same to be correct, put his signatures thereon. There cannot be any stronger evidence than the admission by the parties, in civil proceedings.

Learned counsel for the respondents has also urged that the writing Ex. PW 3/A having not been acted upon, carries no evidentiary value. The argument has been noticed only to be rejected. The writing does not create any right or interest. It is simply an admission, as already noticed, by a party in favour of the other party and the admission is only with regard to the fact that the other party recorded as joint owner is in exclusive possession.

The second question on which the appeal was admitted pertains to the non-registration of writing Ex. PW 3/A. In view of the observations that the writing is not a deed of exchange but only an admission, the question becomes irrelevant.

For the foregoing reasons appeal is accepted and the judgement and decree of the first appellate court are set-aside.

In view of the findings recorded hereinabove, the operative part of the judgement and decree of the trial court also need to be re-modified and recast and the same are modified/ recast as follows:-

Decree declaring that the plaintiff and proforma defendants are in exclusive possession of khasra No. 237, is passed in their favour and against the defendants and the defendants are restrained from causing any interference in the possession of the appellant- plaintiff over the said khasra No. 237.

Prayer for grant of decree of possession by demolition of structure standing on a portion of khasra No. 237 is declined in view of the finding that Tatima prepared by the Patwari during the course of spot inspection by the Presiding Officer of the trial Court is not a relevant piece of evidence. The finding of the trial court regarding exchange is also set-aside in view of the finding by this

court that the alleged document of exchange is in fact not a document of exchange but an admission by defendant Babu Ram. Decree sheet be drawn accordingly.

April 4, 2006. **(Surjit Singh),**
(Hem) **Judge.**